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5 Honorable Judge Benjamin H. Settle
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER ,

Plaintiff,

v.

SHARON KRAUSE and MICHAEL
DAVIDSON,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' MOTION REGARDING
PROPER REBUTTAL EVIDENCE

NOTED: JANUARY 27, 2014

**Plaintiff May Not Present Evidence in Rebuttal That Should Have Been Presented in His
Case-in-Chief**

Defendants bring this motion setting forth the proper scope of rebuttal to the Court's attention because they believe plaintiff will attempt to present improper "rebuttal" evidence that they should have offered in their case-in-chief, or as a reiteration of evidence offered during plaintiff's case-in-chief. This type of rebuttal is inappropriate and defendants move for its exclusion.

The question of admissibility of evidence on rebuttal rests with the Court's discretion. *State v. White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). Defendants ask this Court to be vigilant concerning the propriety of the proposed rebuttal evidence plaintiff presents. Since the defendants simply answered the plaintiff's case-in-chief without raising new issues, rebuttal

1 evidence will be inappropriate.

2 The Federal Rules of Evidence (FRE) provide in relevant part:

3 The court should exercise reasonable control over the mode and order of
 4 interrogating witnesses and presenting evidence so as to: (1) make those
 5 procedures effective for determining the truth; (2) avoid wasting time; and (3)
 6 protect witnesses from harassment or undue embarrassment.

7 FRE 611(a).

8 As a rule, parties are expected to present all of their evidence in their case-in-chief.

9 *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 705 (8th Cir. 1967); *Shirotiak v. H.C. Price Co.*,
 10 758 P.2d 1271, 1278 (Alaska 1988). Although the plaintiff is not required to anticipate
 11 defenses as part of their case-in-chief, the plaintiff may not ignore defense theories or close his
 12 eyes to evidence that simply counters plaintiffs' case. *Id.* Evidence that corroborates and
 13 supports the allegations made by the plaintiff must be offered during the plaintiff's case-in-
 14 chief, not on rebuttal. *Pieniewski v. Benbenek*, 392 N.Y.S.2d 732, 56 A.D.2d 710 (1977).

15 "Rebuttal must be kept in perspective; it is not to be used as a continuation of the case-
 16 in-chief." *Cates v. Sears Roebuck & Co.*, 928 F.2d 679, 685, (5th Cir. 1991). Ordinarily,
 17 rebuttal evidence or testimony may be introduced only to counter new facts presented in the
 18 defendant's case-in-chief. *Allen v. Prince George's Cy. M.D.*, 737 F.2d 1299, 1305 (4th Cir.
 19 1984) (emphasis added) (citing 6 Wigmore, *Evidence*, § 1873 (Chadbourne Rev. Ed. 1976)).

20 The federal courts have repeatedly noted that evidence which properly belongs in the
 21 plaintiff's case-in-chief, but is first introduced in rebuttal, should be rejected so as to avoid
 22 prejudice to the defendant and to ensure the orderly presentation of proof. *E.g., Emerick v.*
 23 *U.S. Suzuki Motor Corp.*, 750 F.2d 19, 22 (3rd Cir. 1984).

24 Washington courts have also stated unequivocally that evidence which could have been
 25 offered during the plaintiff's case-in-chief may be rejected when offered for the first time
 26 during rebuttal. *E.g., Kremer v. Audette*, 35 Wn. App. 643, 647-48, 668 P.2d 1315 (1983).

Rebuttal evidence is admitted to enable the plaintiff to answer new matters presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case....

Kremer, 35 Wn. App. at 647-48 (quoting *State v. White*, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968)).

Thus, rebuttal evidence is receivable only where a new matter has been developed by the evidence of one of the opposing parties and is ordinarily limited to a reply to new points.

Roche Fruit v. Northern Pac. R. Co., 184 Wash. 695, 689-99, 52 P.2d 325 (1935). Proper rebuttal testimony is any competent evidence which explains, is a direct reply to, or a contradiction of material evidence introduced by any opposing party. *Hartley v. State*, 103 Wn.2d 768, 778-80, 698 P.2d 77 (1985). Based on the foregoing authorities, plaintiff should be prohibited from offering improper rebuttal testimony or evidence.

RESPECTFULLY SUBMITTED this 27th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2014, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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